

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN THOMAS ABRAMS,

Defendant.

Case No. 3:14-cr-00069-MMD-WGC

ORDER

Defendant John Thomas Abrams is facing trial on a three-count indictment, including two counts of kidnapping. (Dkt. no 65.) Defendant elected to represent himself (dkt. no. 86), and the Court appointed Dennis Cameron as standby counsel (dkt. no. 87). Trial is set to commence on February 16, 2016. (Dkt. no. 145.)

During a status conference held on February 1, 2016, Defendant reiterated his desire to represent himself, but requested that the Court expand Mr. Cameron's role to allow him to serve as "co-counsel." In particular, Defendant asked that Mr. Cameron be permitted to conduct Defendant's examination and the cross-examination of one of the government's witnesses. The government objected to Defendant's request, citing concerns that such "hybrid representation" is not permissible under governing case law.¹ This Order addresses Defendant's request.

¹After raising this objection, the government's counsel explained that she had not looked at this issue recently, and offered to brief the issue. The Court declined the offer in light of the proximity to trial.

1 In *Faretta v. California*, 422 U.S. 806 (1975), the United States Supreme Court
 2 recognized a criminal defendant's right to represent himself. Subsequently, in *McKaskle*
 3 *v. Wiggins*, 465 U.S. 168, 177-78, 182-84 (1984), the Court established the contours of
 4 standby counsel's role, explaining the extent to which standby counsel may participate
 5 in a proceeding without violating a *pro se* defendant's right to self-representation.²
 6 Before *McKaskle*, the Ninth Circuit observed that "[t]he Supreme Court and this circuit
 7 have recognized the efficacy of hybrid representation to aid *pro se* defendants and
 8 protect the integrity of the trial process." *Locks v Sumner*, 703 F.2d 403, 407 (9th Cir.
 9 1983), *cert denied*, 464 U.S. 933 (1983). "Hybrid representation" refers to two distinct
 10 forms of representation — (1) advisory counsel, which "describe[s] the situation when a
 11 *pro se* defendant is given technical assistance by an attorney in the courtroom, but the
 12 attorney does not participate in the actual conduct of the trial,"³ or (2) co-counsel, which
 13 describes the situation when "the attorney may participate directly in the trial
 14 proceedings with the defendant (examining witnesses, objecting to evidence, etc.)." *Id.*
 15 at 407. While the court may appoint advisory counsel or co-counsel, a *pro se* defendant
 16 does not have a constitutional right to such representation. See *McKaskle*, 465 U.S. at
 17 183 ("*Faretta* does not require a trial judge to permit 'hybrid' representation");
 18 *United States v. Kienenberger*, 13 F.3d 1354, 1356 (9th Cir. 1994) ("A defendant does
 19 not have a constitutional right to 'hybrid' representation."); *Locks*, 703 F.3d at 407.

20 In *McKaskle*, the Supreme Court also clarified that "[p]articipation by counsel with
 21 a *pro se* defendant's express approval is, of course, constitutionally unobjectionable."
 22 465 U.S. at 182. Thus, a *pro se* defendant's request for standby counsel to participate

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 24 ²The Court declined to impose a "categorical bar on participation by standby
 25 counsel in the presence of the jury." *McKaskle*, 465 U.S. at 182. The Court found that
 26 standby counsel may "assist[] the *pro se* defendant in overcoming routine procedural or
 evidentiary obstacles to the completion of some specific task, such as introducing
 evidence or objecting to testimony, that the defendant has clearly shown he wishes to
 complete." *Id.* at 183.

27 ³The *Locks* court also explained that "standby" counsel is "a type of advisory
 28 counsel" who "may take over the defense if for some reason the defendant becomes
 unable to continue." *Locks*, 703 F.2d at 407 & n.3.

1 in a trial “obliterates” any claim that the participation usurps his or her *Faretta* rights. *Id.*;
2 *Frantz v. Hazey*, 533 F.3d 724 (9th Cir. 2008) (*en banc*) (“*Faretta* established that
3 standby attorneys can assist *pro se* defendants ‘if and when’ their help is requested.”)
4 (quoting *Faretta*, 465 U.S. at 834 n. 46). Whether to “allow a defendant to proceed with
5 either form of hybrid representation” (i.e., as stand-by counsel or co-counsel) is within
6 the trial court’s discretion. *Locks*, 703 F.2d at 408.

7 In this case, Defendant has expressly requested that Mr. Cameron elevate his
8 role to co-counsel in two ways — by conducting Defendant’s examination and by cross-
9 examining one of the government’s witnesses. To be fair, for Mr. Cameron to be
10 effective in his role as co-counsel, he must have full discretion to make strategic
11 decisions relating to these two examinations. But Mr. Cameron’s exercise of such
12 discretion may result in a disagreement with Defendant, and could even infringe on
13 Defendant’s *Faretta* rights. See *McKaskle*, 465 U.S. at 178 (noting that standby
14 counsel’s unsolicited control over witness questioning may undermine *Faretta* rights).
15 To alleviate the first concern and to ensure an efficient and smooth presentation before
16 the jury, the Court must establish in advance the contours of Mr. Cameron’s elevated
17 role of co-counsel. Doing so will also permit Defendant to knowingly decide whether to
18 request Mr. Cameron’s added participation. If, after accepting these contours,
19 Defendant consents to Mr. Cameron’s representation, Defendant cannot raise
20 constitutional objections to such representation, even though Mr. Cameron’s expanded
21 role could limit Defendant’s right to self-representation. Instead, Mr. Cameron’s
22 expanded participation is provided only at Defendant’s request and with his consent.
23 Thus, Defendant’s consent to Mr. Cameron’s increased participation after being
24 informed of the parameters of Mr. Cameron’s co-counsel role would obviate any
25 concerns about eroding Defendant’s *Faretta* rights.

26 After balancing Defendant’s request for assistance with the risk of impairing his
27 *Faretta* rights, the Court is inclined to grant Defendant’s request as long as he
28 understands the following contours of Mr. Cameron’s elevated role as co-counsel in

1 connection with Defendant's examination and the cross-examination of one of the
2 government's witnesses:


3 1. Mr. Cameron will assume the role of co-counsel with Defendant
4 providing input;

5 2. Mr. Cameron will have full discretion to make strategic decisions
6 relating to these two examinations, including how to conduct the
7 examinations, what initial questions to ask, what follow-up questions to
8 ask or not to ask, and whether to raise certain objections; and

9 3. Defendant may request termination of Mr. Cameron's co-counsel
10 role at any time, and in that event Defendant will assume the examination
11 himself regardless of whether doing so will create disruption during the
12 trial because trial will not be continued to permit Defendant time to
13 prepare.⁴

14 The Court will entertain input from the parties at the next scheduled status conference
15 before issuing a final ruling. The parties should, of course, continue their preparation for
16 trial, which will proceed on February 16, 2016, as scheduled.

17 DATED THIS 3rd day of February 2016.

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19 _____
20 MIRANDA M. DU
21 UNITED STATES DISTRICT JUDGE
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27 _____
28 ⁴In other words, Defendant should be fully prepared to take over for Mr. Cameron
just as any co-counsel would.